

cbgofloc Conference

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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FLOYD, et al,

Plaintiff,

v.

08 CV 01034

CITY OF NEW YORK, et al,

Defendant.

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New York, N.Y.
November 16, 2012
5:00 p.m.

Before:

HON. SHIRA A. SCHEINDLIN,

District Judge

APPEARANCES

CENTER FOR CONSTITUTIONAL RIGHTS

Attorneys for Plaintiff

BY: DARIUS CHARNEY

NEW YORK CITY LAW DEPARTMENT

Attorneys for Defendant

BY: HIEDI GROSSMAN

1 (In open court)

2 THE COURT: I can see that I have no idea why we are
3 having the conference today, so can somebody remind me.

4 MR. CHARNEY: So we were last here in August, your
5 Honor, and you --

6 THE COURT: Funny, it seems like yesterday.

7 MR. CHARNEY: Time flies.

8 THE COURT: Yeah.

9 MR. CHARNEY: You set a trial date of March 18.

10 THE COURT: That, I know.

11 MR. CHARNEY: And you also set some deadlines for some
12 pretrial submissions in January. And you set this conference
13 to see where we were, ostensibly, because in the intervening
14 three months, we have engaged in more outreach to class
15 members, which we then had to disclose the names of potential
16 witnesses to potential additional trial witnesses to the
17 defendants, which we actually did yesterday.

18 And I think one of the reasons we're here today is to
19 get an update on that, and to also talk about the issue of the
20 trial in terms of whether it would be a bench or jury trial,
21 because we did raise with you in August --

22 THE COURT: I think your choice, not mine, or is there
23 a legal issue?

24 MR. CHARNEY: Well --

25 THE COURT: Are you seeking equitable relief, such

1 that you are saying it should only be a bench trial, or are you
2 also seeking relief that one side or the other is entitled to a
3 jury, if they want it.

4 MR. CHARNEY: So do you want me to address that right
5 now?

6 THE COURT: Sure.

7 MR. CHARNEY: Okay. So when we were here in front of
8 you in August, we said at that point that three of the four
9 named plaintiffs were willing to withdraw their damage claims
10 and only proceed on the equitable claim, if they could have a
11 bench trial, which we thought would be more expeditious, and
12 injunctive relief has always been, for all of them and for the
13 class, has been the priority.

14 Since that point, the fourth plaintiff has also
15 decided that he would be willing to withdraw his damage claims,
16 if we could proceed with a bench trial.

17 THE COURT: So is anybody entitled to a jury under
18 those circumstances?

19 MR. CHARNEY: We believe, no. We think the case law
20 is very clear in this Circuit. Their only equitable claims --
21 I can cite to you the case, it is Design Strategy Inc. versus
22 Davis, it's a Second Circuit case from 2006. I think makes
23 very clear that there is no federal jury trial right, if we
24 only have equitable claims.

25 So we believe that if, in fact, the plaintiffs were

1 willing to withdraw their damage claims, that we would be
2 entitled to a bench trial, that there would be no jury trial
3 for either party.

4 So that's one issue.

5 The other issue, I guess, is in terms of the
6 scheduling of all of this stuff if, in fact, we were going to
7 proceed with the bench trial. Because we have studied, very
8 closely, your pretrial rules and your JPTO requirements, and
9 other requirements. And we notice there are numerous
10 submissions that we would have to submit if this were a bench
11 trial. So we're a little concerned, given the January 11
12 deadline for the JPTO, which we would also have to file motions
13 in limine, we would also have to file proposed findings of fact
14 and conclusions of law, that that is a lot of stuff to try to
15 get done by January 11. And we believe that even if we
16 adjourned that deadline, it would not impact the March 18 trial
17 deadline, which we're fully prepared to receive with and have
18 no desire to delay.

19 THE COURT: Ms. Gross, what's your position on the
20 jury trial issue.

21 MS. GROSS: We just learned yesterday of plaintiff's
22 position. We need to confer with our client.

23 One of the concerns that I have, is if the Court were
24 to order us to go forward with a bench trial, one of my
25 concerns is that if the outcome is such that there is res

1 judicata or collateral estoppel effect, for any futures damages
2 claims, I'm concerned about the seventh amendment right that we
3 would have had to a jury trial.

4 So I have not had a chance to look into that, but
5 those were some of the issues that I have some concerns about.
6 And we need an opportunity to look into that.

7 And then as to the plaintiffs, as to where to proceed
8 from now, if we do have a bench trial, I just need an
9 opportunity to look at your Honor's rules, and see where that
10 fits into our schedule, and you know how to make a proposal. I
11 have not had a chance to look into that. Because we were
12 proceeding as though we're having a jury trial.

13 THE COURT: Sure. Sure, as was I. And I thought
14 there was some benefits to having a jury trial, too --

15 MS. GROSS: Yes.

16 THE COURT: -- for that matter, because it sort of
17 would be important to hear from the community, so to speak.
18 That's what jurors are, they are members of community. And
19 it's really important, in my opinion.

20 But, the law is the law. If it's solely equitable,
21 there is no right to a jury trial. I won't obviously duck my
22 responsibilities. So, we'll see. But I thought there was some
23 benefits to a jury trial.

24 Be that as it may, it sounds like after you've waited
25 an hour and a half to see me, maybe we ought to adjourn this

1 one, so that you can consider your position, confer with your
2 adversary, see if you can agree on certain dates for certain
3 submissions. Or agree on the whole issue of jury versus bench.
4 It doesn't sound like we're really ready today, because in your
5 remarks, Ms. Gross, you twice asked for time to look into two
6 issues, one to develop your final position on jury versus
7 nonjury, but then, secondly, to develop a position on
8 scheduling of the pretrial matters, maybe together with Mr.
9 Charney.

10 Let me just say that I'm probably amenable, in view of
11 the disruption that the hurricane caused both sides here, for
12 the need for some adjournment, limited. But the Court doesn't
13 want to be the one squeezed down, you know, 10 motions in one
14 weekend. That's not going to do, that's not going to do. I
15 have to have enough time to thoughtfully decide all of the
16 pretrial matters, so we have an effective and efficient trial,
17 whether it is bench or a jury.

18 And I know, I do better when I have time to think
19 through the issues. And people raise motions in the middle of
20 a trial and expect a immediate answer, they get an answer, but
21 it has to be a very thoughtful one. So you get more thoughtful
22 answers if I can do it pretrial.

23 So when you do sit down to negotiate, hopefully, a
24 schedule, remember that if you present something that leaves me
25 48 hours to decide, forget it, I'm not going to approve it. We

1 have to think through that the Court needs time.

2 I also should tell you that I have been very careful
3 on motions in limine in big cases to not let parties inundate
4 the Court with endless motions in limine. We have another
5 complex case I have going to trial this June. I had letters
6 exchanged about the potential motions in limine, we discussed
7 them. Some, I was able to knock out right at the conference.
8 The ones I thought should be briefed, we talked about one brief
9 and the page limits for those briefs, and the schedule for
10 those briefs. But, you know, you may have ideas on motions in
11 limine, but you need to exchange letters. And we need to have
12 a motion in limine conference, because I am not going to be in
13 a day with twenty different motions, that's out too. No way,
14 bench or jury, I'm not going to have endless motions, each one
15 being 60 pages, that's not gonna happen. So I can end up with
16 600 pages and that's not going to happen.

17 So when, can you come back on one of the three days
18 next week? I was thinking Wednesday afternoon. I know it's
19 not a popular afternoon, Thanksgiving is the next day, but you
20 may have developed your position on jury versus nonjury. And
21 you may even have had time to talk to each other about
22 scheduling. I don't want to let it slip very long. And I'm
23 not in town the following Monday and Tuesday, I'm in
24 Connecticut. So I wouldn't be able to do that.

25 So if we don't do it next Monday, Tuesday or

1 Wednesday, we are really in a difficult shape. So my
2 preference would be Wednesday afternoon.

3 MS. GROSS: Wouldn't be at four, if we have it, right,
4 because somebody else grabbed the 4:00. But it could be 3:30,
5 with some luck.

6 MR. CHARNEY: We could do Wednesday afternoon.

7 THE COURT: All right. Why don't I set it down for
8 3:30 in the hope that the case on trial will be done by then.

9 MS. GROSS: Give me one moment?

10 THE COURT: Certainly.

11 MS. GROSS: Your Honor, my concern about next
12 Wednesday is this issue, the issue that I'm concerned about, I
13 have to have the time to do the research.

14 THE COURT: Yes.

15 MS. GROSS: And --

16 THE COURT: Today is only Friday.

17 MS. GROSS: It is only Friday. But we also have
18 papers due in Lagan on Tuesday. We have class certification
19 papers. So I'm not saying that we won't put our effort and
20 best efforts to get this issue resolved, but I'm thinking if we
21 can just do it after the week of -- the week after
22 Thanksgiving.

23 THE COURT: I said I'm out of town. I'm trying a case
24 in another district.

25 MS. GROSS: Very good, okay.

1 THE COURT: That's my point. We'll lose most of the
2 week.

3 MS. GROSS: But what about this. What if we -- the
4 parties confer that we take the time that we need to do to
5 research this issue, but in the interim we'll do the best we
6 can do to resolve that, but also confer that if the Court is
7 going to be inclined to order a bench trial, and we don't have
8 a right to that, we can still at least confer about alternative
9 dates.

10 THE COURT: I have to warn you that if you don't agree
11 and there is a dispute, I'll probably require briefs, it's an
12 important issue.

13 MS. GROSS: I understand.

14 THE COURT: So if you come to the same conclusion as
15 Mr. Charney, and you agree under the law that it has to be
16 bench, if it's only equitable relief, although I understand
17 your concerns about the res judicata effect, if you happen to
18 agree, that's easy.

19 MS. GROSS: Right.

20 THE COURT: If you don't agree, I'm not going to
21 decide it on two letters and some argument. I think you are
22 entitled to full briefing, because it's a very important
23 question, whether it is jury or not jury. So, yes, you want to
24 do research and develop the position, but not to finalize --

25 MS. GROSS: Okay.

1 THE COURT: -- the briefing, so to speak.

2 MS. GROSS: So we would have an opportunity if --

3 THE COURT: Oh, yeah.

4 MS. GROSS: -- at the beginning of our research we
5 determine that we would oppose, we would have an opportunity to
6 fully brief it.

7 THE COURT: I think it should be fully briefed. I
8 think it's an important question.

9 MS. GROSS: Okay. Wednesday, 3:30, should be fine.

10 THE COURT: Okay. And if I had known this would be
11 this short, I would have taken you first, since you were --

12 MS. GROSS: I do want to raise another issue.

13 First of all, in terms of what you mentioned in terms
14 of working around the dates, we're operating under the
15 assumption that the March trial date doesn't change at all.

16 THE COURT: Correct.

17 MS. GROSS: Very good. I wanted to make sure.

18 THE COURT: I was also told it was lengthy trial, it
19 was predicted to be four to six weeks, so I scheduled this
20 other monster to follow.

21 MS. GROSS: Okay.

22 THE COURT: So, you know, it would be very disruptive
23 not to go.

24 MS. GROSS: I was just making sure, okay.

25 THE COURT: Got you.

1 MS. GROSS: One issue that I'm very concerned about is
2 that provided their Rule 26A disclosures. And if you remember,
3 your Honor, back in late August, you conferenced, you discussed
4 the plaintiff's looking at the UF 250 data base, doing a search
5 and sending out mailings to individuals from the UF 250 data
6 base from 2009.

7 Plaintiffs sent those mailings out. And it was
8 contemplated that the plaintiffs would meet with individuals to
9 express an interest in being a trial witness, and then they
10 would identify those witnesses in Rule 26A, so that we would
11 then have an opportunity, the defendant would have an
12 opportunity to conduct appropriate discovery.

13 So we received some names yesterday. The scope of
14 discovery was, in my understanding, limited to that aspect of
15 the case. Because the discovery has been closed for years.

16 (Continued on next page)

17
18 THE COURT: You mean the scope of any further
19 discovery?

20 MS. GROSSMAN: Yes.

21 THE COURT: Go ahead.

22 MS. GROSSMAN: Plaintiffs for the first time have
23 identified a new witness who is tantamount to a new expert.
24 His name is Eli Silverman. We think that at this late date
25 plaintiffs' attempt to identify new experts is just too late

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1 and inappropriate and should not be allowed.

2 Mr. Silverman is a professor of policing, police
3 ethics, police training programs at John Jay, and the
4 plaintiffs have identified him as a witness for purposes of
5 information regarding two surveys of recently retired New York
6 City personnel which he conducted in 2010 and 2012 concerning
7 pressure on NYPD officers to conduct stop and frisks, issue
8 summonses, and make arrests between 2002 and 2012.

9 This is not a new theory that the plaintiffs have been
10 advancing. They have been advancing a quota theory for years.
11 For them to come down to use this as an opportunity to now
12 identify a new expert witness puts us in a position where we
13 have to contemplate do we need another expert at this late date
14 is I just think inappropriate right now.

15 Plaintiffs have had many indulgences of the Court with
16 Professor Fagan by providing up updated and supplemental
17 reports time and time again.

18 I think there comes a time when this just has to stop.
19 Just wanted to express that concern that defendants have.

20 MR. CHARNEY: May I respond?

21 First of all, it is our position, and I think it is
22 very clear, that we are not putting forth Professor Silverman
23 as an expert. He is not going to express any opinions.

24 THE COURT: What is he?

25 MR. CHARNEY: He is going to simply report on the

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1 results of his surveys about what retired officers who he
2 surveyed said about whether or not they felt pressured from
3 superiors around this issue of quotas.

4 THE COURT: Why so late, though?

5 Ms. Grossman says, correctly, that the notion of
6 coercion or pressure, quotas has been in the case for years.
7 If you wanted to have this guy interview retired officers, you
8 could have asked him to do that two years ago, had the survey
9 done a year ago, named him a witness half a year ago, and had
10 him deposed within the discovery deadline.

11 Why now.

12 MR. CHARNEY: A couple of things. The first survey,
13 which was done in 2010, we actually did disclose to the
14 defendant in our summary judgment opposition over a year and a
15 half ago as Exhibit 39 of our payments.

16 THE COURT: Done by this guy?

17 MR. CHARNEY: Yes.

18 THE COURT: By Silverman?

19 MR. CHARNEY: Yes, the first survey, the one in 2010.
20 It is inaccurate for Ms. Grossman to say for the first time we
21 are disclosing it now.

22 THE COURT: Hold on. You saw a Silverman survey of
23 2010 information in the summary judgment motion, Ms. Grossman?

24 MR. CHARNEY: It was 39.

25 MS. GROSSMAN: There was a report that a, a public

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1 report --

2 THE COURT: He said it was an exhibit in the summary
3 judgment motion.

4 MS. GROSSMAN: I don't know that that is admissible.

5 THE COURT: That is not my point.

6 MR. CHARNEY: That is a separate.

7 THE COURT: You had it and new about it. You had this
8 report of this fellow.

9 MS. GROSSMAN: If it was in the summary judgment, I
10 accept the plaintiff's representation that it was in the
11 summary judgment, as are many reports that are not now leading
12 to witnesses giving testimony.

13 MR. CHARNEY: Along the same lines, the New York City
14 Police Department has several times since 2010 spoken publicly
15 and offered critiques of the survey publicly. It is in the
16 public record.

17 So, again, the suggestion that this is some 11th hour
18 surprise survey is just inaccurate. The 2012 survey which
19 Professor Silverman did -- make no mistake. He is not somebody
20 that we went out and hired to do so a survey. He's conducted
21 all of his research independently.

22 THE COURT: Who was he doing the survey for?

23 MR. CHARNEY: He is doing it for himself and his
24 colleague Professor Turnow. They are completely independent of
25 us. We didn't hire them. They are not our expert witnesses.

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1 He did a second survey which was published only in June 2012.

2 It is not something that we were aware of until recently.

3 THE COURT: I see.

4 MR. CHARNEY: We did not have any contact with him
5 until about two months ago, I guess in September. So this is
6 not somebody we have been holding in our back pocket to wait
7 until discovery is over to then surprise the defendants with.

8 Again, it is our position that his testimony is simply
9 reporting the results of a survey. Whether or not survey
10 evidence is admissible is obviously an evidentiary issue --

11 THE COURT: Right.

12 MR. CHARNEY: -- which we are fully prepared to brief,
13 and I would assume that would be a motion in limine about
14 whether this is admissible evidence.

15 THE COURT: It is obviously based on hearsay.

16 MR. CHARNEY: Yes.

17 THE COURT: The interviews are all hearsay.

18 MR. CHARNEY: Right. We do think there are two
19 hearsay exceptions that this falls under, but we are not going
20 decide that today.

21 THE COURT: Right.

22 MR. CHARNEY: He is not an expert.

23 THE COURT: I've got it now.

24 MR. CHARNEY: It's not something that we did not
25 disclose or waited to disclose or could have disclosed earlier,

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1 and it is not something we have been hiding.

2 THE COURT: To the extent you did disclose the 2010
3 survey much earlier on the summary judgment motion, I
4 understand that.

5 MR. CHARNEY: These surveys have been in the public
6 record for years. This is not new surprise evidence.

7 THE COURT: I got it. These are a professor writing
8 in his field for his own reasons for his own academic research.

9 The 2010 was an exhibit in the summary judgment
10 motion. He's chosen to update his own survey in 2012. That
11 just came out. You want to call him as a witness but he is not
12 retained by you.

13 You can subpoena him. So could the other side if they
14 would like what they found in the survey. It is just another
15 fact witness so to speak. But you can see there could be an
16 attack on the admissibility of this survey evidence, and you
17 are prepared to brief that issue.

18 MR. CHARNEY: Yes.

19 THE COURT: So I think it is fair from listening to
20 this discussion, Ms. Grossman, to say they are not adding an
21 expert outside the period of expert disclosure. It's an
22 academic who has written in the field.

23 They have his survey, and you knew about it. When I
24 say you knew about it, you can't remember every exhibit in
25 summary judgment, but you say if he said so, you don't doubt

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1 his word.

2 It was an exhibit in the summary judgment motion a
3 long time ago. So they want to call him as a witness at some
4 point. This is the period for naming witnesses.

5 MS. GROSSMAN: No, your Honor. The period to name
6 witnesses was years ago.

7 THE COURT: No, that is not true. We do a joint
8 pretrial order and we list the witnesses for trial. Really
9 that is when sort of the rubber hits the road. If you look at
10 the pilot project, if there is a witness named in the joint
11 pretrial order that wasn't previously deposed, under our pilot
12 project the parties are asked to agree to depose that person.
13 Read it.

14 I told you before this case is a complex case, and I
15 am applying the pilot project rules retroactively to this case.
16 I am sure I have told you that before.

17 So take a look at that. So this is the time for
18 people to present the joint pretrial order and name their
19 witnesses. So it is wrong to say years ago.

20 In fact you asked recently, in the last couple of
21 months, to please tell us who the witnesses are, please tell us
22 which plaintiffs you are going to call, please tell us what
23 other facts that you know.

24 In other words, there comes a time to name witnesses.
25 By the way, it's in Rule 26 also. You don't have to list your

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1 trial witnesses until you do the pretrial order.

2 So it's wrong to say they had to do it year ago. If
3 you are thinking about initial disclosures that is true, and
4 they have to be updated. But under Rule 26 with the
5 preparation of pretrial order you name your trial witnesses.

6 Then under the pilot project, anybody who is named who
7 has not been deposed they can be deposed. So I don't really
8 see the issue other than the admissibility itself. That will
9 be a hotly contested issue should this survey evidence come in
10 at all. But they are not hiring an expert untimely.

11 MS. GROSSMAN: So then that leaves the door open for
12 every article that cited and now we start putting in those
13 witness. Your Honor, I just think there is a bit of reason
14 that you have to exercise here because --

15 THE COURT: I have been doing that for the last 19
16 years.

17 MS. GROSSMAN: I know but I think in this particular
18 situation -- I appreciate that and you have, your Honor -- I am
19 asking you to give real thought to this because the
20 plaintiffs --

21 THE COURT: I have given real thought to this. This
22 was an exhibit in the summary judgment motion. You have known
23 about this survey for a long time.

24 In addition, Mr. Charney says the survey has been all
25 over the public record. It's been in the record, then it's

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1 been attacked.

2 Mr. Charney, who has attacked the survey?

3 MR. CHARNEY: I mean --

4 THE COURT: The city? The mayor? Who has gone around
5 attacking it?

6 MR. CHARNEY: NYPD's public spokespersons have
7 commented on it.

8 THE COURT: So everybody knows about this survey
9 except me. Apparently, it is in the paper, it's been attacked.
10 It is not a surprise. It wasn't prepared for litigation. It
11 is not coming out of the blue.

12 This is the time for the preparation of the joint
13 pretrial order. Read about the pilot project, which says this
14 fellow can be deposed. But there may be a strong argument that
15 it can't come in. That I can't even begin to opine about
16 tonight.

17 MS. GROSSMAN: Right. To that end, what this is
18 causing, this late disclosure, because it is a late disclosure
19 in terms of a witness.

20 THE COURT: Why do you say that? This is the time for
21 liting the witnesses.

22 MS. GROSSMAN: No.

23 THE COURT: They are doing it now. You are preparing.

24 MS. GROSSMAN: Rule 12 --

25 THE COURT: Excuse me. We are preparing the joint

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1 pretrial order under Rule 26. I think Rule 26 talks about 90
2 days or 30 days. It is all in the rule.

3 MS. GROSSMAN: That is for experts.

4 THE COURT: No, no. Trial.

5 Do you want me to read to you? I will read it to you.

6 MS. GROSSMAN: Your Honor, if I may.

7 THE COURT: Do you want to hear the rule or not?

8 MS. GROSSMAN: I know the rule.

9 THE COURT: What do you know? If you know it, what
10 number of days is it? 30, 60, or 90?

11 MS. GROSSMAN: I thought that it was 90 days and 30
12 days for experts.

13 THE COURT: No. You have go the wrong part of the
14 rule. I'm telling you it's not for experts.

15 MS. GROSSMAN: All I am saying --

16 THE COURT: Since you don't know it and I don't know
17 it by heart, we will look it up.

18 Yes, that is what I thought.

19 "In addition to the disclosures required by Rule
20 26(a)(1) and (2), a party must provide to the other party and
21 promptly file the following information about the evidence that
22 it may present at trial other than solely for impeachment:

23 (1) The name and the address and telephone number of
24 each witness;

25 (2) The designation of those witnesses whose testimony

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1 the party expects to present by deposition.

2 (3) An identification of each document or exhibit.

3 (b) Time for Pretrial Disclosures. Unless the court
4 orders otherwise these disclosures must be made at least 30
5 days before trial.

6 MS. GROSSMAN: Right. I understand that.

7 THE COURT: All right. So that is all witnesses.

8 MS. GROSSMAN: I know, but the notice of the witnesses
9 you intend to call, which is the initial disclosures which you
10 mentioned --

11 THE COURT: Yes.

12 MS. GROSSMAN: -- Rule 26 requires the plaintiff to
13 supplement timely.

14 THE COURT: True.

15 MS. GROSSMAN: Timely.

16 THE COURT: True.

17 MS. GROSSMAN: If they have had notice since the
18 summary judgment motion that they were going to call this
19 person as a witness, and they have not done that --

20 THE COURT: I haven't ordered a witness list, and
21 according to the federal rules unless I order otherwise it is
22 due 30 days before trial. I don't want it to be February 18,
23 and if I haven't set a date, it's the date that I said the
24 plaintiff should prepare their pretrial order.

25 Did I say what date you are to submit your version?

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1 MR. CHARNEY: Yes.

2 THE COURT: What date is that?

3 MR. CHARNEY: January 11.

4 THE COURT: January 11 is when they have to come up
5 with the witness list. Luckily, they are telling you about
6 this in November, not January, so you're getting two extra
7 months.

8 So this person is not barred as untimely. That
9 doesn't mean there isn't a good argument for excluding the
10 survey, but it is not untimely. The witness list is due
11 January 7 according to the federal rules. I am saying unless I
12 order otherwise it's only 30 days, which would be February 18.

13 MS. GROSSMAN: I think this is discovery by ambush.

14 THE COURT: OK.

15 MS. GROSSMAN: We have not had an opportunity to do
16 discovery, and to now put us in a position to have to brief
17 this issue on the admissibility of it when it could very well
18 be hearsay --

19 THE COURT: Yes, I understand that. We take survey
20 evidence all the time in infringement cases; copyright,
21 trademark, infringement. It's a daily event in this
22 courthouse. All those surveys are based on interviews, they
23 call them shopping mall intercept surveys. They are all
24 hearsay. But then the survey pulls it together, and we take it
25 in every trademark infringement case.

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1 MS. GROSSMAN: Are those usually through experts?

2 THE COURT: They are usually through experts.

3 MS. GROSSMAN: Not sort a random person?

4 THE COURT: But that doesn't make the point. The
5 point is this survey has been done for a long time. You have
6 known about it. It was in the summary judgment motion.

7 It is nice that you have preserved your objection for
8 the record, but I just quoted the federal rules. So I don't
9 have the time for this problem.

10 Luckily, as I said you have two extra months, because
11 he wasn't required to tell you his witnesses until January 11
12 when you prepare the pretrial order. By November 11 you know
13 all about.

14 So let's move expeditiously through this. Please
15 study the pilot project, too, which says any witness named
16 after discovery has closed and this applies to either side,
17 will be deposed. If the city were to name witness,
18 Mr. Charney, that you haven't deposed, you have the right to
19 depose that witness.

20 We have a date to see you Wednesday at 3:30.

21 MS. GROSSMAN: Your Honor.

22 THE COURT: Yes.

23 MS. GROSSMAN: I have something. I have some other
24 issues.

25 THE COURT: I am going to have to stop in eight

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1 minutes at the most because I have got to get through a charge
2 conference and leave at 6:00.

3 MS. GROSSMAN: OK. I could preview it and then we
4 could address it further on Wednesday.

5 But one of my concerns is that the plaintiffs have
6 identified additional witnesses who complained about stops that
7 arose out of NYCHA, which is related to the Davis case. So for
8 us to be put into the position of having to do additional
9 discovery at this late date when that in our view --

10 THE COURT: Why do we need those NYCHA stop people
11 here?

12 I am talking to Mr. Charney. Are they stopped in the
13 NYCHA building, around the NYCHA building? Where are they
14 stopped?

15 This is the street stop case, and that's the NYCHA
16 case.

17 MR. CHARNEY: Yes. They were stopped. It is the
18 NYCHA case. But our class includes anybody who has been
19 illegally stopped and frisked in the city of New York by the
20 NYPD. Some of the people have been stopped in NYCHA some
21 haven't. I guess I don't really understand what the city's
22 concern is.

23 THE COURT: The thought is that you -- I am not
24 meaning you -- but three separate lawsuits have been filed.

25 MR. CHARNEY: Yes.

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1 THE COURT: Yet you want to sort of merge them all
2 back together. That is really unfair. We have three separate
3 tracks of discovery, three separate tracks of motion practice,
4 three separate class certification motions. Why do we need the
5 NYCHA plaintiffs here? You have enough people who have been
6 stopped on the streets of the City of New York.

7 MR. CHARNEY: They have, your Honor.

8 THE COURT: I thought the number was -- actually I
9 thought you mentioned millions at one point.

10 MR. CHARNEY: Yes. We think it's several million if
11 you go back ten years.

12 THE COURT: Yes.

13 MR. CHARNEY: We believe that they were illegally
14 stopped without reasonable suspicion on the basis of their
15 race.

16 THE COURT: I know that.

17 MR. CHARNEY: NYCHA is not a defendant in this case.
18 We are not suggesting there was any misconduct on the part of
19 the housing authority. We are saying that the New York Police
20 Department violated these individuals' constitutional rights.

21 We don't think the testimony is in any way redundant
22 of other plaintiffs, because they were stopped in different
23 parts of the city, different boroughs.

24 THE COURT: Maybe that's whole point. How many
25 individual stories do I need to listen to anyway, whether it's

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1 me or the jury. I could have a hundred, I could have fifty --

2 MR. CHARNEY: Yes.

3 THE COURT: -- I could have thirty, I could have ten.

4 MR. CHARNEY: Your Honor --

5 THE COURT: How many different scenarios were you
6 planning on?

7 MR. CHARNEY: Just so you know and Ms. Grossman
8 neglected to tell you we only identified four additional class
9 member witnesses, so we are not talking --

10 THE COURT: Additional to what? What is the other
11 number?

12 MR. CHARNEY: Our named plaintiffs and the four class
13 declarants. We have now a total universe of 12 people who
14 would be testifying. I don't think that is an unreasonable
15 number.

16 They now have to depose four more individuals. So the
17 burden on them is minimal considering that the depositions they
18 have already done of the other declarants each took about three
19 hours. They could do two in a day. If they had two lawyers
20 they could do all four in one day.

21 So the burden argument is exactly --

22 THE COURT: They have seven. They have seven here
23 today.

24 MR. CHARNEY: I don't think the burden argument flies
25 here. We are talking about four more witnesses that they would

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1 have to depose.

2 MS. GROSSMAN: Your Honor, that equals, they have
3 subpoenaed 16 additional officers for us to now identify and
4 produce for deposition between now and January 11 before we put
5 together our joint retrial order in addition to the four
6 plaintiffs who have to be deposed.

7 THE COURT: In other words, these are the officers
8 involved in these four stops?

9 MR. CHARNEY: Yes.

10 MS. GROSSMAN: There are 20 total depositions that
11 have to take place between now and January, December 31 or
12 January 5.

13 THE COURT: Let me ask this question: Why do they
14 have to be completed by December 31?

15 MS. GROSSMAN: Well, if we have to do a joint pretrial
16 order by January 11.

17 THE COURT: So what? Why do the depositions have to
18 be completed by then? How does it affect the joint retrial
19 order?

20 MS. GROSSMAN: Right.

21 THE COURT: He lists the four people, you list the 16
22 officers. Who cares if depositions are completed and squeezed
23 in between now and December 31. Why can't they be completed by
24 February 15 or something?

25 MS. GROSSMAN: We have motions in limine. I don't

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1 know if that would affect -- clearly, you can appreciate, it
2 is not the ideal way to litigate a case. The federal rules are
3 there for a reason, to have an orderly, professional discovery.

4 THE COURT: I agree with that, but, as I said before,
5 the federal rules talk about naming trial witnesses 30 days
6 before trial.

7 MS. GROSSMAN: But not doing discovery --

8 THE COURT: I understand that. But this is a class
9 action. They get to select the people they want to call. It
10 sounded reasonable when there were four. Then you point out
11 there's 16 officers involved and four stops. If you want to
12 depose all those officers, then they have to defend all those
13 depositions. You are going to have to schedule 20 depositions
14 between Thanksgiving and New Year's? I don't think so.

15 MS. GROSSMAN: My point, your Honor, is we don't --
16 the plaintiff mentioned burden, that there is no burden. That
17 is disingenuous to say there is no burden on us.

18 THE COURT: They didn't say no -- they said it wasn't
19 a great burden to do four people. I didn't realize four was
20 20.

21 MS. GROSSMAN: Right. So that wasn't the full story.

22 THE COURT: Right.

23 MS. GROSSMAN: What I can say is that if there are
24 NYCHA-related stops that is part of another class action from
25 purported or putative class actions --

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1 THE COURT: They are overlapping classes.

2 MS. GROSSMAN: Right. Why bother with the time. We
3 have a lot to do.

4 THE COURT: Because I guess he thinks 12 is a better
5 number than eight. It is not a huge number for a class this
6 size.

7 MR. CHARNEY: No.

8 THE COURT: And for the number of stops involved in
9 this case, to have 12 stories when there's 2.8 million stops or
10 something is not a large number.

11 Is it what's bothering you that it is NYCHA or is it
12 bothering you that it is four?

13 MS. GROSSMAN: No. It is a bothering me -- well,
14 first of all, it's overlapping with other issues.

15 THE COURT: I understand. But if was four non-NYCHA,
16 you would be just as distressed with the thought of 20
17 deposition.

18 MS. GROSSMAN: I am, but I could understand. We were
19 ready to forward with some of them, and we are not opposing
20 that. We have to. That's what we contemplated.

21 I am just submitting and suggesting, I am advocating
22 that a NYCHA-related stop is not relevant to --

23 THE COURT: But it is relevant. The problem is it's
24 relevant. They are all part of the large class in Floyd. They
25 are not non-class members because they are NYCHA residents.

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1 MS. GROSSMAN: What are they going to be class members
2 for? Are they going to be class members in the case or class
3 members in Ligon --

4 THE COURT: No, not Ligon because they live in the
5 housing authority building. They don't live in a Clean Halls
6 building.

7 MS. GROSSMAN: My point is there are three different
8 cases.

9 THE COURT: I am perfectly aware of that,
10 Ms. Grossman. What I am trying to say is that Floyd overlaps
11 both Ligon and Davis. But that doesn't mean that those two
12 overlap each other, because the private buildings and the NYCHA
13 buildings are different.

14 So Ligon and Davis don't overlap, but Floyd is the
15 umbrella. Anybody improperly stopped in the basis of race is
16 in the Floyd case.

17 MS. GROSSMAN: I think there are unique issues in the
18 NYCHA case that you have seen through some of our briefing.

19 THE COURT: Yes. That's why I asked you where these
20 stomachs were. Were they in the building?

21 MS. GROSSMAN: Yes.

22
23 THE COURT: If they are in the building, this doesn't
24 make sense.

25 MR. CHARNEY: Your Honor --

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1 THE COURT: Mr. Charney, I have to stop now because it
2 is 5:30. I have to do the charge conference.

3 MR. CHARNEY: Can we pick up on Wednesday?

4 THE COURT: But let me tell you my preliminary
5 thoughts. If it's in the building, don't go there. I am not
6 going to do it. That really treads on the issues Davis.

7 If it is on the street or in the vicinity or even in
8 the -- who knows what -- the parking lot. But if it is in the
9 building, there are different issues involved in the NYCHA
10 case.

11 With that guidance, Mr. Charney, I am not opposed to
12 12. I am willing to extend the discovery period. I don't
13 think it affects the pretrial order.

14 I will get through everything, but if it is inside the
15 building, that really crosses the line in my opinion today.

16 See you Wednesday.

17 (Adjourned)
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